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Supreme Court of the United States

OCTOBER TERM, 1959

No. 972

SOCONY-VACUUM OIL COMPANY, INC., now known as SOCONY-MOBIL OIL COMPANY, INC., and BETHLEHEM STEEL COMPANY,

Petitioners,

against

CECIL LAWLOR,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR WRIT OF CERTIORARI

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners, Socony-Mobil Oil Company, Inc., and Bethlehem Steel Company, respectfully pray that a writ of certiorari issue out of this Court to review the judgment of the United States Court of Appeals for the Second Circuit affirming a judgment of the United States District Court for the Southern District of New York in this cause.

Opinion Below.

No opinion was written by the district court, but the court's charge to the jury is printed in the record (73-103). The opinion of the Court of Appeals for the Second Circuit (111-120) is reported in 275 F. 2d 599.

References are to the new page numbers of the certified record.

Jurisdiction.

The judgment of the Court of Appeals sought to be reviewed was dated and entered on March 8, 1960; and the jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

Questions Presented

1. Whether a shore-based worker engaged in making permanent repairs to leaks, as part of an annual overhaul and repair of a vessel, is doing work customarily or historically performed by seamen *as a matter of law*.

2. Whether a "dead ship" undergoing overhauling and repairs in a shipyard to make her seaworthy, so she can be licensed and navigate, can be considered in navigation during such period while she has no means of propulsion.

3. Whether a ship undergoing overhaul and repairs in a shipyard is warranted seaworthy to a shore-based workman repairing her, merely because she had been navigating before going to the shipyard and had not been laid up in a "mothball fleet" or elsewhere.

4. Whether a shipowner warrants his ship's seaworthiness to shore repairmen who have control of the repair work and the work area, merely because they do not have control of all the rest of the ship,—the whole ship; and whether the owner is liable for unseaworthiness because the ship's crew was on board, rather than having been discharged.

5. Whether staging erected on, and ladders brought onto, a ship by shore-based repairmen solely for their own use in performing the work required of them become appurtenances or equipment of the ship, as a matter of law, when they are not used to perform ship's work.

Statement.

This petition is filed jointly by a shipowner and a shipyard operator for a review of a judgment of the Court of Appeals (121), affirming a district court judgment (107-109), in a diversity of citizenship action tried before a jury. Both petitioners consider the judgment against the defendant shipowner improper, and to have followed a departure from the accepted course of proceedings in a jury trial.

As the original errors to be pointed out relate back to the trial, we will refer to the parties as they were there; respondent here as plaintiff, and petitioner Socony-Mobil Oil Co., Inc., as defendant. For brevity, we will refer to petitioner Bethlehem Steel Company, third-party defendant, merely as Bethlehem.

The action was brought to recover damages from the defendant for personal injuries sustained by the plaintiff, a quarterman in charge of chippers and caulkers in Bethlehem's shipyard at Hoboken, New Jersey, while working on defendant's tank vessel *Mobilfuel*. The complaint alleged both negligence of the defendant and unseaworthiness of the vessel. The defendant filed a third party complaint against Bethlehem, the plaintiff's employer, for indemnity.

At the close of all the evidence, the trial court dismissed plaintiff's negligence claim and submitted the unseaworthiness count to the jury with instructions (73-103). The jury returned a verdict for the plaintiff against the defendant, and for the defendant against Bethlehem, and judgment was entered accordingly (107-9).

The defendant and Bethlehem appealed, and the Court of Appeals affirmed the judgment (120, 121). Thus, the matter involves only a question of liability for alleged unseaworthiness. The plaintiff's rights against Bethlehem, his employer, are exclusively under the Longshoremen's & Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq., and that company could be liable in this action only if the defendant were liable.

This petition is not directed against the jury's findings of fact as such, but against findings, and the charge, of the trial court. Petitioners are asking a review of the charge on which the verdict was based, the jury having been instructed (1) that the *Mobilfuel* was in fact unseaworthy and (2) that her owner owed a seaworthy vessel to the plaintiff. The court also told the jury that a ladder from which the plaintiff fell, and which was owned, brought on the vessel and used only by Bethlehem's employees for their repair work, was an appurtenance of the vessel.

The facts and evidence were:

Defendant's tank vessel *Mobilfuel* went to Bethlehem's shipyard in June, 1954, for overhaul and repair, including repairs to the propulsion equipment (71-72). On June 30, when plaintiff was injured (6), the *Mobilfuel's* generators and boilers were dismantled and there was no means of starting them (71-72). She was a "dead ship" without boilers, turbines, etc. working; electricity, steam and water being supplied to her from shore (44, 67).

Before the vessel went into the shipyard, inspection was made on behalf of the owner in order to draw up specifications for repairs (66), which included looking for leaks and cracks (69). After arriving at the yard, known leaks were repaired, tanks were tested and additional leaks were found and repaired (6-7). Plaintiff, a quarterman in charge of the shipyard chippers and caulkers (5), supervised the repairing of the leaks (7, 32, 48). As a quarterman he was "the first step below the foreman", and his duties included finding leaks that were not pointed out by the vessel's representatives (48-49). He had been in chipping and caulking work for twenty years (31-32), and he not only worked on repairs (48) but also on new vessel construction (25).

In order to find and repair leaks, Bethlehem employees erected scaffolds or stagings on the tank bulkheads for its

chippers and caulkers to work from (25, 27, 37, 46), and all the material used was supplied by Bethlehem (47). Plaintiff told the scaffold builders where to erect them (7), and they were erected without consultation with, or supervision of, anyone from the vessel (47).

Plaintiff's accident happened in a port wing tank of the *Mobilfuel*, either No. 3 or No. 4 (6, 37), which is forty feet deep (9, 11). On the longitudinal bulkhead between that port tank and the center tank Bethlehem scaffold builders had erected three hanging stagings, one above another (27, 29): There was a permanent steel ladder extending from the top of the tank to the bottom (8, 26, 27), which was about six to eight feet from these stagings (28).

Plaintiff testified that, after one of the Bethlehem scaffold builders told him the staging was up, he went down the steel ladder and walked over to the upper staging on planks that had been placed there for that purpose (8, 28). After he inspected for, and marked, leaks in the bulkhead, he said he climbed down to the next lower staging (9, 28) and then climbed down to the third, or lowest, staging (9, 29). After checking the leaks in that area, he intended to go to the bottom of the tank (9-10). There was a wooden ladder standing against this lower staging and, without looking to see whether it was secured (27), he started to climb down it (10, 26, 29, 30). It was a Bethlehem ladder put there by Bethlehem men (27, 47). He assumed the ladder was nailed or lashed to the staging but he did not look to see whether it was (26, 27, 30, 33). When he was down part way on this ladder, it fell backward with him and he sustained his injury (10, 31).

Plaintiff testified that before he went on the staging one of the Bethlehem scaffold builders said to him "Hey, Lawlor, your staging's up" (8). No one said anything about the ladder (33); and there was nothing wrong with it (27, 31, 47). The staging was nearly completed (50, 56, 61, 66), but all the men who were erecting it had left the

tank before plaintiff's accident to get more material to finish it (56, 57, 59). The staging itself did not contribute to plaintiff's accident; it was the ladder that was not secured to the staging (10, 27). There was testimony that a ladder would not be secured until after the erection of the staging is completed (61, 62), because it has to be moved from time to time during the erection (61).

Although the vessel had a crew aboard, the tank was turned over to Bethlehem for repairs (67) and the crew had nothing to do with it and none of them was in it (10, 11, 36, 45-46, 47, 67). At the time of plaintiff's accident the crew was back on the after deck scaling (36). None of them supervised, directed or took any part in the tank repairs (67-8).

Plaintiff contended that he was doing work traditionally done by seamen; but the only evidence offered in that connection was the testimony of the vessel's chief mate that seamen on occasions make temporary repairs to leaks with Cordabond or a cement box (70). He testified, however, that a vessel is not equipped to make permanent repairs of leaks or cracks, and that has to be done at a shipyard (71); and the work being done at the Bethlehem shipyard was not such as seamen do (71). In any event, permanently repairing leaks was only a part of the work done by Bethlehem on the *Mobilfuel* (44, 71-72).

Reasons for Allowance of the Writ.

1. The decision below is in conflict with decisions of other Courts of Appeal involving similar important matters of maritime law.

2. The courts below decided federal maritime questions in a way that conflicts with applicable decisions of this Court in *United N. Y. & N. J. Sandy Hook Pilots Ass'n* v. *Halecki*, 358 U. S. 613, and *West* v. *United States*, 361 U. S. 118.

3. The courts below so far sanctioned a departure from the applicable and usual course of proceedings in a jury trial as to call for exercise of this Court's power of supervision.

4. The decision below decided important questions of federal law which have not been settled (footnote 7 to *Halecki* case), but which should be settled by this Court to the end that there may be some uniformity in the maritime law.

5. The questions presented are of great public importance to everyone in the maritime industry, including all shipowners and operators, all ship repair companies and their employees, and all people, other than crew members, who do any work on ships.

Argument.

As clearly demonstrated by the opinion of the Court of Appeals, there has been much confusion with respect to the persons, other than seamen, to whom a shipowner owes a warranty of seaworthiness, and what is actionable unseaworthiness. In this case a shipowner was held liable for unseaworthiness because a repair yard's sound ladder was not fastened by it to its staging. Although this was a jury case, the Court of Appeals either overlooked or sanctioned the trial judge's deciding, and instructing the jury, that the vessel was unseaworthy and that the shipowner was liable for the alleged unseaworthiness. *He left to the jury only the amount of damages to award.*

The court treated the verdict as one found by the jury rather than one directed by the trial judge, and thereby sanctioned the district court's findings of fact. It treated the case as one of law only, which warranted the trial judge deciding whether the vessel was unseaworthy and whether the owner was liable therefor. In *Reynolds* v. *Royal Mail Lines* (C. A. 9), 254 F. 2d 55, 57, cert. den. 358 U. S. 818, it

was said "the burden of proof of unseaworthiness rested on the appellant (plaintiff)." To the same effect: *Freitas* v. *Pacific-Atlantic Steamship Co.*, 218 F. 2d 562. In *Poignant* v. *United States* (C. A. 2), 225 F. 2d 595, 598 (a seaman's case in admiralty) the court pointed out that whether a ship is unseaworthy is for the trier of the facts.

The Court of Appeals' opinion states that the plaintiff "was doing the work traditionally done by seamen, as we have already found to be the case" (116, 275 F. 2d at p. 602). That, however, is a fact question for the jury. The only evidence on that issue was that temporary repairs to leaks are sometimes made by seamen; but it is necessary to have *permanent* repairs made at a shipyard, and that is not work such as traditionally done by seamen (71).

The opinion then states that the "determining factors" in the case are "the character of the work to be done by the shipyard, the presence or absence of a crew" and the "measure of control or lack of *control by the shipyard over the vessel as a whole.*" (Italics supplied.) (119) It further says "we hold there was a warranty of seaworthiness" to the shore-based workers "performing work customarily done by seamen," notwithstanding "the scaffolds and ladders were the property of Bethlehem and Bethlehem had control of the particular part of the vessel" (the port wing tank) where the work was performed, because the shipowner had "general control of the vessel." (114) This is a holding that the shipowner warrants that one in control of the area involved will not create an unseaworthy condition if the owner controls the rest of the ship. In other words, that one with no control of the area or the work warrants what some one else in control will not do. We do not believe the cases cited by the court below support its conclusions that the ship was unseaworthy or that the owner warranted it to this plaintiff to be seaworthy.

The court said "the instructions to the jury on the subject of unseaworthiness were perhaps more favorable

to the shipowner than it was entitled to." (119-20). The trial judge having told the jury that the ship was unseaworthy and the owner owed the plaintiff a seaworthy ship, thus *leaving to the jury only the amount of money to award* the plaintiff, it is difficult to understand how the instruction could be less favorable to the shipowner, unless by also telling the jury the court's finding as to what the money damage was.

In the opinion below, Judge MEDINA said this case presented "the interesting question specifically left open for future consideration" in *United N. Y. & N. J. Sandy Hook Pilots' Ass'n* v. *Halecki*, 358 U. S. 613, footnote 7, i.e., whether a shipowner can be liable for unseaworthiness "to a shore-based worker who performs labor on a ship which is *not ready for a voyage but is out of navigation and docked in a private shipyard for its annual overhaul and repair*" (Italics supplied). (113) We agree that that undecided question is presented here as part of the over-all inquiry whether there is liability for alleged unseaworthiness in working tools and equipment owned, brought onto the ship and used by the repairmen, not as part or an appliance of the ship, but as tools of the repairmen in a part of the ship under their sole control. In this case, however, there is the added fact that the plaintiff's accident was not caused by the staging or the ladder, but by the plaintiff *assuming* they were secured together *because of what his fellow worker told him.*

The court below went further than this Court has ever gone in holding the shipowner to absolute liability, without its fault, for claimed fault of the repairmen in their use of (in the language of the Court of Appeals in *Berryhill* v. *Pacific Far East Lines, Inc.* (C. A. 9), 238 F. 2d 385, cert. den. 354 U. S. 938),

> "equipment that the ship could do without, that the owner may never have bought or even seen, or have had any reason to know it existed."

1. Respondent was not performing work customarily or traditionally performed by seamen.

At the outset we wish it to be understood that we do not question the authority of *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, or *Pope & Talbot* v. *Hawn*, 346 U. S. 406. Those were cases in which the vessels involved were not taken out of navigation, but were handling cargo for the voyages they were on. The same is true of *Rogers* v. *United States Lines*, 347 U. S. 984 (reversing 205 F. 2d 57); *Alaska Steamship Co.* v. *Petterson*, 347 U. S. 396 (aff'g 205 F. 2d 478); *Crumady* v. *The Joachim Hendrik Fisser*, 358 U. S. 423 and *The M/V Tungus* v. *Skovgaard*, 358 U. S. 588, 595.

The present case involves legal questions not passed on in those cases, and which are governed by other decisions, particularly *West* v. *United States*, 361 U. S. 118, and the *Halecki* case, *supra*, 358 U. S. 613. We believe the court below misconstrued this Court's opinion in the *West* case.

We concede that longshoremen, or carpenters assisting the loading operations of longshoremen, can be found to be doing work traditionally performed by seamen, but that does not mean that everything done on a ship is seamen's work. This Court so recognized in *McDaniel* v. *The M/S Lisholt*, 359 U. S. 26, where it reversed 257 F. 2d 538 and remanded the case for a new trial, *but only* on the question of negligence.

In *West*, Mr. Justice CLARK said the question of an owner holding a ship out to be seaworthy depends on the status of the ship and the work to be done on it "*rather than the specific type of work that each of the numerous shore-based workmen are doing on shipboard at the moment of injury*" (Italics supplied). In other words, it is not a question of whether the man injured was himself doing seamen's work at that particular instant, but whether the

over-all repair work was such as seamen customarily or traditionally perform.

He explained that to base a warranty on what each man was doing at the particular time would require a job analysis that would "lead to fortuitous results." That would seem unassailable. It seems incomprehensible that a warranty of seaworthiness is owed to a laborer who is working alongside an expert turbine repairer or builder, or a boilermaker, but not to the expert himself, even though they are both working on the same overhaul repair job.

The same ruling was made in *Amato* v. *United States* (D. C., S. D. N. Y.), 167 F. Supp. 929, where the plaintiff, a shipyard painter, was injured on a vessel undergoing repairs and conversion in a shipyard. The shipowner was held liable for negligence but *not for unseaworthiness*, the court saying with respect to the unseaworthiness claim:

> "The libelant contends that he was engaged in painting the ship and that painting was part of the work customarily done by the crew, and that therefore the warranty of seaworthiness must extend to him also under the holding of these cases (*Sieracki* and *Hawn*). I do not agree. * * *
>
> "As I view it, the 'work' which libelant was performing was a part of the work of complete overhaul, renovation and reconversion of the ship. * * *
>
> "To hold otherwise would lead to very strange results. * * * The determination of liability would depend on the merely fortuitous circumstance of whether the libelant's work on an over-all reconstruction job was by pure accident, crew work or something other than crew work.
>
> "This would introduce into this already confused field of liability, a whole body of speculative elements which would deny recovery to one worker engaged in the reconstruction project and permit recovery for another who was standing next to him, merely by the accident of his trade or craft." Pages 935-6.

To the same effect is *Latus* v. *United States* (D. C., E. D. N. Y.), 170 F. Supp. 837, 841 (recently affirmed but not yet officially published), where the court said:

> "In determining whether there was a warranty of seaworthiness running to an injured repair worker, the specific task being performed by such worker must be regarded in relation to the overall work being performed upon the ship, of which such task forms a part. It thus cannot be said that the libelant was protected by a warranty of seaworthiness simply because he was engaged in painting the ship and painting is part of the work customarily done by the crew."

See also *Huber* v. *United States* (D. C., Cal.), 177 F. Supp. 617, 618-19.

Applying the rule of the cases cited, defendant did not warrant to plaintiff that the *Mobilfuel* was seaworthy. Plaintiff's work was part of the work required under the repair contract, which involved dry docking, drawing the tail shaft, taking down turbines and other propulsion equipment, etc. (41, 71-72). Seamen do not dry dock vessels, pull tail shafts, dismantle turbines, condensers and boilers.

In any event, however, as we have pointed out, plaintiff's own work was not that traditionally performed by seamen. The evidence, and the only evidence, is that he was engaged in making permanent repairs to cracks and leaks and that is not done by seamen, but must be done in a shipyard (71). The jury did not find from evidence that plaintiff was performing seamen's work, but *the trial judge told them that he was.*

All the authorities hold that the warranty of seaworthiness to a shore-based worker applies *only* to one doing seamen's work; but this plaintiff was not, and the overhauling and repairs on which he was engaged was not such as required only seamen's work.

Raidy v. *United States* (D. C. Md.), 153 F. Supp. 777, aff'd 252 F. 2d 117, cert. den. 356 U. S. 973, involved a

claimed warranty of seaworthiness to a shipyard worker who was taking part in major repairs on a vessel in dry dock. The libelant backed into a hole where his fellow shipyard workers had removed plates as a necessary step in the repair work. The district court held that there was no liability of the vessel owner for unseaworthiness, saying that the work being performed was not "the type of services historically and traditionally rendered to the ship by members of the crew but to the contrary required the facilities and skilled personnel of a modern well-equipped shipyard." The Court of Appeals for the Fourth Circuit affirmed the district court "for reasons adequately stated by it."

In that case it was a part of the ship (a hole in the deck) that caused the repairman's injury; but in the case at bar it was not the ship but the repairmen's working equipment.

In *Halecki, supra,* this Court held that there was no warranty of seaworthiness to a shore-based worker cleaning generators on a ship in a shipyard for annual overhauling and repairs, saying:

> "It avails nothing to say that the decedent was an 'electrician,' and that many modern ships carry electricians in their crew. * * * It is scarcely more helpful to indulge in the euphemism that the decedent was 'cleaning' part of the ship, and say that it is a traditional duty of seamen to keep their ship clean. * * * *We therefore hold that it was error to instruct the jury that the shipowner could be held liable in this case even if they should find that the shipowner had exercised reasonable care.*" 358 U.S. at page 618. (Italics supplied.)

In this case the trial judge did exactly what this Court said was error in *Halecki.* He instructed the jury that the shipowner could be held liable even though it exercised reasonalbe care. He said (84):

> "The owner of the vessel * * * owes to a seaman * * * and *the plaintiff* * * * *has the same rights*

> • • • a duty • • • of furnishing a seaworthy vessel and safe and proper appliances in good order and condition. *He owed it to this plaintiff.* • • • It is only necessary to show that the condition upon which the absolute liability is determined—unseaworthiness—exists." (Italics supplied.)

In *Berryhill* v. *Pacific Far East Lines, Inc., supra,* 238 F. 2d 385, cert. den. 354 U. S. 938, a shipyard employee sued for injuries sustained when a grinding wheel, attached to a portable grinding machine or tool owned and furnished by his employer, shattered or disintegrated on a vessel docked for repairs. Plaintiff claimed that the grinding wheel was unseaworthy, but judgment was granted to the shipowner on the pleadings, and affirmed by the Court of Appeals. That court pointed out that in *Pope & Talbot, Inc.* v. *Hawn, supra,* 346 U. S. 406, the injured plaintiff was a carpenter repairing equipment used by stevedores to load and unload a ship on a voyage and his work was performed to permit the loading "to go on at once."

It also referred to *Alaska Steamship Co.* v. *Petterson, supra,* 205 F. 2d 478, aff'd. 347 U. S. 396, which involved injuries to a longshoreman by equipment brought onto the ship by his co-workers and used *as equipment usually furnished and necessarily required by the ship.* It was said that it became ship's equipment necessary to enable the crew to perform ship's work, i.e., loading and unloading.

That court also referred to *Rogers* v. *United States Lines, supra,* 347 U. S. 984, where a longshoreman was injured by a runner furnished by his employer to be used on one of the ship's winches, and pointed out that that equipment was reasonably necessary for the longshoremen to do the ship's work. It then pointed out that Berryhill's repair work had nothing to do with loading or unloading the ship and said "not all repairs are 'ship's work' to be performed historically or currently by the crew."

In *Filipek* v. *Moore-McCormack Lines* (C.A.2), 258 F. 2d 734, cert. den. 359 U. S. 927, cited in the *West* case, an employee of a rigging tester sued a shipowner for injuries resulting from the breaking of a ship's kingpost. With respect to the unseaworthiness claim the Court of Appeals said:

> "In any event, the plaintiff (sic) did not warrant the seaworthiness of the vessel to Filipek. The doctrine of seaworthiness extends only to members of the ship's crew and to those, such as longshoremen, who do work traditionally done by members of the crew." Page 736.

The court below said "recent holdings by the Supreme Court we think leave us no alternative other than to hold, as we do, that Lawlor was engaged in the type of work traditionally done by seamen" (114). We do not believe any decision of this Court requires a lower court to hold as a matter of law that a shore-based repairman is doing seamen's work merely because the ship is not from a "moth-ball fleet", or is being reconstructed, or has a crew on board. Certainly, that was not required by the decisions in *Halecki, supra, Berryhill* v. *Pacific Far East Lines, supra, Filipek* v. *Moore-McCormack Line, supra, Boudoin* v. *Lykes Bros. S.S. Co.* 348 U. S. 336, and other cases. Whether a man is doing seamen's work is a question of fact depending on evidence. The only evidence in this case was that making temporary repairs is sometimes done by seamen, but plaintiff was not making temporary repairs.

It also said: "True it is that if the injured shore-based worker was engaged in work not traditionally or customarily performed by members of the crew of the vessel, as turned out to be the case in *Halecki*, there could be no recovery for unseaworthiness" (118); but that plaintiff was doing seamen's work "as we have already found" (116). Having made a jury finding, it then proceeded to hold that

there was a warranty of seaworthiness to the plaintiff because the shipowner had general control of the vessel, with a crew abroad, although the shipyard "controlled the particular area where" the work was being performed (118). To support that holding it had to make *a finding* that Bethlehem's work of dry docking, overhauling and repairing the *Mobilfuel* was seamen's work.

2. Respondent was injured on a vessel out of navigation, while it was being made safe to resume navigation.

This Court has never held that there is a warranty of seaworthiness to a shore-based worker unless the vessel is taken out of lay-up or "mothballs," or is being reconstructed, or has no crew on board. All cases recognize that the worker *must be doing seamen's work*. Otherwise the whole basis of a warranty to him fails. Such matters are only items of evidence as to the worker's status, but they do not create a status that does not otherwise exist. If the plaintiff "was doing what any crew member had never done on this ship or anywhere else in the world" (*Halecki* case, 358 U. S. at p. 618), we cannot believe that he could be held to be doing seamen's work merely because the ship was not being reconstructed, had a crew, and had not come out of lay-up. Such items of evidence did not control the *Halecki* decision.

It is true that the vessels in *West* and some other adjudicated cases were taken out of the "mothball fleet," and that fact was referred to in the opinions holding that there was no warranty of seaworthiness. But that is not the sole, or a necessary criterion, because the worker must be engaged in seamen's work to be entitled to the warranty in any event.

It is also true that the vessels in *Berge* v. *National Bulk Carriers Corporation*, 251 F. 2d 717, cert. den. 356 U. S.

958, *Raidy* v. *United States, supra,* 153 F. Supp. 777, aff'd 252 F. 2d 117, cert. den. 356 U. S. 973, and some other cases were being altered, reconstructed or converted, but that likewise is not a necessary criterion for the same reasons.

In the *Halecki* case the vessel was not taken out of lay-up, but was in a shipyard for *annual overhaul and repairs,* the same as the *Mobilfuel* which is here involved.

In *Berryhill* v. *Pacific Far East Line,* 238 F. 2d 385, *supra,* cert. den. 354 U. S. 938, the vessel was in a shipyard for repairs and the plaintiff, a shipyard worker, was injured by a machine owned and furnished by his employer. The vessel had not been taken out of a lay-up fleet.

In *Filipek* v. *Moore-McCormick Lines, supra,* 258 F. 2d 734, cert. den 359 U. S. 927, the plaintiff was a rigging tester who was injured when a kingpost, a part of the ship, snapped under strain during testing. The vessel had not been taken out of a lay-up fleet.

In *Kermarec* v. *Compagnie Generale,* 245 F. 2d 175, 358 U. S. 625, and *McDaniel* v. *The M/S Lisbolt,* 257 F. 2d 538, 359 U. S. 26, the vessels were not out of lay-up, but were on voyages. That fact, however, did not create a warranty of seaworthiness, any liability of the shipowner depending on its negligence.

In *Crumady* v. *The Joachim Hendrik Fisser,* 358 U. S. 423, a longshoreman was injured, while unloading cargo from a vessel on a voyage, by the breaking of the vessel's topping lift cable. This Court held there was a breach of warranty of seaworthiness in that a cut-off device had been improperly set by the ships crew. This decision was not based on the vessel being out of navigation.

In *Goett* v. *Union Carbide Corporation,* 361 U. S. 340, the vessel was not taken out of lay-up but was in a shipyard and, as said by the Court of Appeals, 256 F. 2d 449, "had been temporarily withdrawn from navigation." The Court of Appeals held that there was no warranty of seaworthiness to the plaintiff but this Court did

not pass on that issue, remanding the case back to the court below for a determination with respect to the application of a state death statute.

In *Berti* v. *Compagnie de Navigation Cyprien Fabre* (C.A. 2), 213 F. 2d 397, 400, a longshoreman sued a vessel owner for injuries sustained when a cable from the ship's winches dislodged a hatch beam supporting a hatch cover on which the plaintiff was standing. There the vessel was on a voyage, and the Court of Appeals said of the warranty of seaworthiness:

> "If plaintiff's injuries resulted solely from the manner in which the work was done under American's (stevedore) supervision, he has no recourse against Cyprien (shipowner)."

In *Phipps* v. *N.V. Nederlandsche Amerikaansche, S.M.* (C.A. 9), 259 F. 2d 143, 145, the vessel involved was on a voyage and the plaintiff longshoreman was injured while loading cargo.

The Court below said that "the presence or absence of a crew performing the customary work of seamen on shipboard" is one of the determining factors in a case of this kind (119). It expressed a legal conclusion that some one else doing seamen's work on another part of the vessel; creates a warranty of seaworthiness to shore-based repairmen whose work is solely under their own control, in an area which is also under their control. The idea advanced would seem to be that it does not matter that the repairmen control their work and the area of it, if there are crew members doing work elsewhere. Such a holding would make it necessary for a shipowner to discharge all of the crew to protect himself against liability not connected with any negligence of his own.

We cannot believe that it is the policy of the law to require a shipowner to discharge the crew when the ship goes out of navigation, and becomes a dead ship not capable

of navigating, in order to protect itself against independent repairmen injuring each other. Surely, the law does not require a shipowner to deprive men (even temporarily) of their livelihood in order to avoid liability without fault. In the words of the Court of Appeals for the First Circuit (*Mitchell* v. *Trawler Racer, Inc.*, 265 F. 2d 426, 432),

> "Unless and until the Supreme Court tells us that this is indeed the law, we shall continue to believe that it is not so."

3. The work being performed, and the tank in which it was performed, were in the control of the repairmen.

In the opinion below of Judge MEDINA, he said "While Bethlehem controlled the particular area where the scaffolds and ladders were put up and where the work of locating or repairing the leaks in the tank bulkheads was being performed, the shipowner had general control of the vessel" (119), and "West, however, makes it clear that, at least in some cases, control of the vessel is a *decisive factor*" (118) on the question of a warranty of seaworthiness to a repairman. He also said that the "measure of control or lack of control by the shipyard *over the vessel as a whole*" is one of the "*determining factors* that rule the decision in this case" (119). The point he apparently was making was that, to avoid responsibility of the shipowner for a condition created by the repairmen, the shipyard must have control of the ship "as a whole."

It seems illogical to base liability on control of an area rather than control of the work being performed. We cannot understand why a shipowner is liable without fault if the ship's master, mates and engineers occupy and control their quarters on the ship, where no repairs are to be made, but is not liable if the rest of the ship and those quarters are not occupied by them. We do not believe any

decision of this Court goes so far as to base liability on control of a whole ship regardless of lack of control of the work being performed and the work area. Certainly, there is no warranty of seaworthiness to a repairman who is doing work never done by a seaman merely because the shipyard does not have control of *the whole ship*. *United N. Y. & N. J. Sandy Hook Pilots Ass'n* v. *Halecki*, *supra*, 358 U. S. 613.

In our opinion the Court of Appeals misconstrued the *West* decision. Although in that case the whole ship was turned over to the shipyard, that fact was cited merely as an item of evidence that the shipowner had no control of the repair work being performed. Of course, that is some evidence, because one who does not have any control of any part of the ship does not have control of the manner in which work is performed on it by other authorized workers.

As an example of Judge MEDINA's misinterpretation of the *West* opinion (although of no great moment in this case) we refer to his reference (118) to the following language of Mr. Justice CLARK:

> "Petitioner overlooks that here the respondent had no control over the vessel or power either to supervise or to *control the repair work* on which petitioner was engaged. We believe this decisive against both aspects of plaintiff's dual theory." (Italics supplied.)

Judge MEDINA said the dual theory referred to was "negligence and unseaworthiness", but a cursory reading of the opinion discloses that the "dual theory" referred to negligence only,—(1) failure to furnish a safe place to work, and (2) failure to keep a water plug tight. It had nothing to do with a warranty of seaworthiness.

In *West* this Court pointed out that control of the work was important on the question of liability for unsea-

worthiness. One could not warrant what others did if he had no control of it. It was said of the vessel and the work,

> "She was undergoing major repairs and complete renovation, as petitioner knew. Furthermore, he took his orders from the contractor, not the shipowner. He knew who was in control."

The court below purported to interpret the reference in the *West* opinion to "the status of the ship, the pattern of the repairs and the extensive nature of the work contracted to be done" to mean that the ship must be taken out of a "mothball fleet" or other lay-up, for more than a general overhaul and repair, e.g., reconstruction, conversion or rebuilding. We are unable to read such restrictions in the language of this Court. It is true that the ship in *West* had been taken out of the "mothball fleet", but we do not believe that this Court meant that every vessel other than one taken out of lay-up, owes a warranty of seaworthiness to any man who does any work on it. Let us suppose a vessel is very seriously damaged in a collision, which makes it imperative that it be taken out of navigation and put in a shipyard for repairs; and that such repairs require other than seamen's work. It might be in worse condition, and require more expert workmanship, than the one taken out of lay-up. Surely, this Court did not mean that it would be warranted seaworthy merely because it had been in use before the necessity for such repairs arose.

Although there was no conversion or rebuilding of the *Mobilfuel*, we cannot agree that that should be necessary to avoid a warranty of seaworthiness. The ship was what is known as a "dead ship", having its electricity, water and

steam supplied from shore (26, 44, 67). Repairs were made to the propulsion machinery (71) and there were no fires or means of starting the generators, even if they had been otherwise serviceable (72). The evidence was that there was a complete overhaul and extensive repairs, including dry docking and the drawing of her propeller shaft, and taking down the generators and condensers (71-72). Seamen do not dry dock vessels and overhaul propeller shafts, nor perform the nineteen items of overhauling and repairing the ship's boilers.

The warranty of seaworthiness is imposed by law, but it does not seem reasonable that, unless the shipowner has no control of the rest of the ship, it imposes a warranty to others, whom it does not control, that their equipment, which is not used as ship's equipment, will be safe. The obligation should depend on control of the work area and the work being performed there, and not merely on control of parts of the ship where no repair work is performed. We submit that the real question is as to the control of what is done by the outside workmen.

4. The ship, its equipment and appliances, were not in fact unseaworthy in any respect contributing to respondent's accident.

The leaks in the ship's tanks did not contribute to plaintiff's fall, and there was nothing defective in the shipyard ladder on which he fell. The claim is that the ship was unseaworthy because the repairmen did not secure the ladder to the staging which they erected solely for their own temporary use. That the failure of the repairmen to nail or tie the ladder was entirely without fault of the shipowner is clear from the dismissal of the negligence count.

That plaintiff fell with the ladder which was not nailed or tied to the staging, was never in dispute. However, the trial judge charged the jury:

> "If you find from the evidence that the ladder was unsecured and gave way, then it was not adequate or sufficient for the work to be performed by plaintiff, and *an unseaworthy condition existed upon the vessel.*" (85)
>
> "I did charge you that if you find from the evidence that the ladder was unsecured and gave way that it was not adequate and sufficient for the work to be performed by the plaintiff, and *an unseaworthy condition existed on the vessel.*" (102)
>
> "If the ladder was unsecured and gave way then it was not adequate and sufficient for the work performed by the plaintiff." (103) (Italics supplied)

Since the fact that the ladder was not secured was an undisputed, conceded fact, the court's charge to the jury was that there was, in fact and in law, unseaworthiness for which they must find the shipowner liable. Whether an unseaworthy condition existed was a question of fact for the jury and could not "be decided by the judge as a matter of law." *Borgen* v. *Richfield Oil Corporation* (C. A. 9), 257 F. 2d 505, 507.

A shipowner is not an insurer of his vessel against mishap. In the words of the Court of Appeals for the Fourth Circuit (*Ross* v. *S/S Zeeland*, 240 F. 2d 820, 822):

> "* * * the ship and her owners are not insurers of the safety of men working on board. * * * The doctrine of unseaworthiness does not extend so far as to require the owner to keep appliances which are inherently sound and seaworthy absolutely free at all times from transitory unsafe conditions resulting from their use."

In *Reynolds* v. *Royal Mail Lines, supra*, a longshoreman sued a shipowner, claiming negligence and unseaworthiness, for injuries sustained when a wooden platform fell and struck him. The platform belonged to the ship, but the plaintiff's fellow servants had rigged it for a wind break.

It was not designed to be so used, but was for protection of the ship's deck during loading and discharging. The district court found that there was no unseaworthiness of the platform if used for the purpose for which intended, and it did not render the ship unseaworthy. The Court of Appeals affirmed, saying:

> "This warranty of seaworthiness, however, is not that the ship, or gear, or equipment is absolutely seaworthy and safe in all events, but only reasonably so, and then only when employed or used for some purpose for which it was intended."

In that case the platform was an appliance or equipment of the ship, but the Bethlehem ladder was not.

In *Berti* v. *Compagnie de Navigation Cyprien Fabre*, 213 F. 2d 397, 400, *supra*, the Court of Appeals for the Second Circuit said:

> "But it has never been held that it (the doctrine of unseaworthiness) requires the best possible equipment, * * *. It requires only that equipment be reasonably fit for the use for which it was intended * * *."

In *Phipps* v. *N.V. Nederlandsche Amerikaansche S.M.*, *supra*, 259 F. 2d 143, 145, a longshoreman was struck by a piece of timber which slipped from its sling while being lowered through a hatch so narrow that it was necessary to slant the timber at an angle to get it through the hatch opening. Plaintiff sued for both unseaworthiness and negligence and the trial court directed a verdict for the shipowner on both counts. The Court of Appeals affirmed, saying:

> "The shipowner has no burden of an insurer and is not required to provide an accident-proof ship. * * *
> "Unseaworthiness cannot be extended to the point of holding the owner liable in a case where he contracted for the loading of a customary cargo in a customary way, no failure of ship's gear being shown

> and no showing that what was customary was not reasonable, but simply and solely on the basis that an accident occurred."

In that case the ship itself (the hatch opening) was involved in the accident, but no part of the *Mobilfuel* was involved in this plaintiff's accident.

The court below cited *Alaska Steamship Company* v. *Petterson, supra,* as authority for the proposition that a shipowner may become liable even though "the article that was defective or *defectively put together* was the property of the stevedore *or shipyard* that employed the shore-based worker who was injured" (Italics supplied). We are not questioning the authority of that case, but we should point out that it did not involve any shipyard, nor any article "defectively put together." It involved a block which was attached to and made a part of the ship's own gear,—it became a part of the ship's equipment that was necessary to the loading work being performed. As said of it in *Berryhill* v. *Pacific Far East Lines, Inc., supra,* at page 387:

> "This equipment (block) took the place of equipment usually furnished and necessarily required by the ship. It was ship's equipment necessary to enable the crew to perform 'ship's work'."

That court pointed out that the same was true of *Rogers* v. *United States Lines,* 347 U. S. 984, where a runner was furnished by the plaintiff's employer to be used on one of the ship's winches for unloading purposes.

The Bethlehem ladder was not furnished or used as a part of the *Mobilfuel's* equipment to perform ship's work, and it could not be considered an appurtenance of the ship by attachment to it. The only complaint, and the basis of the holding below, is that it was not attached to the ship, nor to Bethlehem's staging. It was left by Bethlehem's employees leaning against the staging until they should complete their work, and it never became an appurtenance

or appliance of the ship. The shipowner did not warrant Bethlehem's tools to Bethlehem's employees. As said by the Court of Appeals for the Second Circuit in *Fredericks* v. *American Export Lines*, 227 F. 2d 450, 454:

> "But tools or equipment do not become part of a lessee's plant merely because such tools or equipment are indispensable to the work that an independent contractor has agreed to perform."

In the case at bar the plaintiff was not injured on or by a part or appliance of the *Mobilfuel*, but was on equipment owned and used only by his employer; and his mishap occurred after *the vessel had been taken out of navigation for overhaul and repair before resuming navigation.*

The plaintiff's fall was not caused by any defect in the staging or the ladder. It resulted from his assuming that the ladder was secured to the staging, but he was not told so and he could have easily determined whether it was. He got on the ladder at the top where any lashing or nailing would have had to be. He attempted to justify his blindly assuming a condition, without looking, by his testimony that one of his fellow workers told him the staging was up, although he was not told anything about the ladder. The effect of the decision below is to make a shipowner liable to a repairman because he is misled by his fellow worker as to the securing of his own equipment. We do not know of any other case where such misinformation has been held to impose, by operation of law, a warranty of seaworthiness by a ship owner who has no knowledge of it.

Conclusion.

In conclusion we submit that there was error in the decision below in that plaintiff-respondent was not, in fact or law, doing seamen's work; his work was in the control of the shipyard, and not in control of the shipowner; the

M/V Mobilfuel was not in navigation while in the repair yard, dismantled and being overhauled and repaired to make her seaworthy; and she, and her equipment and appurtenances, were not unseaworthy. The case presents issues of fact for the determination of the jury, but which were improperly decided by the court as issues of law only. The court below sanctioned the trial court's usurpation of the province of the jury and rendered a decision in conflict with, and contrary to, other court decisions, thereby adding to the confusion in a matter of great public importance in the maritime field.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari issue out of and under the seal of this Honorable Court, directed to the United States Court of Appeals for the Second Circuit, to the end that this cause may be reviewed and determined by this Court; and that the judgment of the Court of Appeals for the Second Circuit be reversed; and that your petitioners be granted such other and further relief as may be proper.

HERBERT C. SMYTH,

FRANK A. BULL,
Counsel for Petitioners.

WE HEREBY CERTIFY that we have examined the foregoing petition, and that in our opinion it is well founded and entitled to the favorable consideration of this Court, and that it is not filed for the purpose of delay.

HERBERT C. SMYTH,

FRANK A. BULL,
Counsel for Petitioners.

Appendix A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 176—October Term, 1959.

(Argued February 3, 1960 Decided March 8, 1960.)

Docket No. 25878

CECIL LAWLOR,

Plaintiff-Appellee,

—against—

SOCONY-VACUUM OIL COMPANY, INC., now known as SOCONY-MOBIL OIL COMPANY, INC.,

Defendant and Third-Party Plaintiff-Appellant,

—and—

BETHLEHEM STEEL COMPANY,

Third-Party Defendant-Appellant.

Before:

MEDINA and WATERMAN, *Circuit Judges,* and MADDEN, *Judge,* United States Court of Claims.*

Appeal from a judgment of the United States District Court for the Southern District of New York. Edward A. Conger, *Judge.*

The shipowner and a third party defendant appeal from a judgment in favor of a shore-based worker injured on board a vessel moored at the pier of a shipyard for annual

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* Sitting by designation.

overhaul and repair, holding the shipowner liable for the unseaworthiness of the vessel and entitled to recover over against the shipyard whose failure to fasten a ladder to a scaffold in the course of repairing leaks to tank bulkheads was the immediate cause of the accident. Affirmed.

BERNARD CHAZEN, Hoboken, New Jersey (Nathan Baker, Milton Garber, and Baker, Garber & Chazen, Hoboken, New Jersey, on the brief), *for plaintiff-appellee.*

HERBERT C. SMYTH, New York, N. Y., *for defendant-appellant Socony-Mobil Oil Company, Inc.*

FRANK A. BULL, New York, N. Y. (Mendes & Mount, New York, N. Y., on the brief), *for third-party defendant-appellant Bethlehem Steel Company.*

MEDINA, *Circuit Judge:*

At least since *Pope & Talbot, Inc.* v. *Hawn*, 1953, 346 U. S. 406, it has been common practice in this Circuit and elsewhere in diversity cases for an injured shore-based worker who claims he was doing the type of work traditionally done by seamen but who was employed by third parties, such as stevedores and shipyards, to sue the shipowner on the law or civil side of the District Courts, alleging both unseaworthiness of the vessel and negligence as a basis for recovery and demand a jury trial. That is what was done in this case. Cecil Lawlor was employed by Bethlehem Steel Company at its Staten Island shipyard and during her lay-up in the shipyard for annual overhaul was supervising the men engaged in marking up places in the tanks of the tank vessel Mobilfuel where there were leaks

and cracks in the bulkheads leading from one tank to another. A series of scaffolds and ladders belonging to Bethlehem had been put in place by the Bethlehem men and the ladder leading from the last scaffold to the bottom of one of the tanks was almost perpendicular, but it was not fastened to the scaffold; and the ladder fell backwards as Lawlor descended it and he was precipitated to the bottom of the tank and seriously injured. At the close of the evidence Judge Conger dismissed the negligence count against the shipowner, Socony-Mobil Oil Company, Inc. but sent the case to the jury on the charge of unseaworthiness and the jury found the vessel unseaworthy; they also found contributory negligence by Lawlor which reduced the recovery, and the net result was a judgment in favor of Lawlor against the shipowner and a recovery over against Bethlehem on a third party claim. Both Socony-Mobil and Bethlehem appeal.

Thus we have for decision the interesting question specifically left open for future consideration by the Supreme Court in *United Pilots Ass'n* v. *Halecki*, 1959, 358 U. S. 613, footnote 7 on page 618: whether a shipowner can be liable for the unseaworthiness of a vessel "to a shore-based worker who performs labor on a ship which is not ready for a voyage but is out of navigation and docked in a private shipyard for its annual overhaul and repair."

The accident occurred on June 30, 1954. On June 24 the vessel arrived at the Bethlehem shipyard; she left on July 2. She was in dry dock for a few days for the customary repairs to and painting of the bottom, propellers and so on. Then she was moored in navigable waters at Pier 3, where she remained until Lawlor was injured. She had a full crew of officers and men aboard performing seaman's duties but electric power and water were supplied from shore. The work called for by the contract with Bethlehem was the usual large number of miscellaneous items, including the finding of cracks and leaks in the tanks and

repairing them. No structural changes in the vessel were to be made, nor did the contract call for anything in the nature of a major or substantial item of change or repair. The total cost of the work was $70,834 and the contract required performance in 14 days.

The scaffolds and ladders were the property of Bethlehem and Bethlehem had control of the particular part of the vessel where the leaks and cracks in the tanks were being located. We think it clear from the evidence that the shipowner was in general control of the vessel. As Bethlehem was in complete charge and control of the scaffolds and ladders, and one of the Bethlehem men had carelessly failed to affix or tie to the scaffold the ladder which toppled over and caused Lawlor's injuries, we think the negligence count of the complaint was properly dismissed. If the recovery against the shipowner for breach of warranty of seaworthiness is sustained Bethlehem is liable on the third party claim over by the shipowner against it.

Recent holdings by the Supreme Court we think leave us no alternative other than to hold, as we do, that Lawlor was engaged in the type of work traditionally done by seamen. *The Tungus* v. *Skovgaard*, 1959, 358 U. S. 588; *Pope & Talbot, Inc.* v. *Hawn*, 1953, 346 U. S. 406. See also *Pinion* v. *Mississippi Shipping Co.*, E. D. La., 1957, 156 F. Supp. 652. Chief Officer Bennett testified that at times when the vessel was not in a shipyard for repairs the location and the temporary repair of cracks and leaks in the tank bulkheads were done by him and by members of the crew under his supervision. Equipment, including ladders, was on board and it could be and was used for this purpose.

It is also settled law that the unseaworthiness doctrine may be applicable and the shipowner become liable even though the article that was defective or defectively put together was the property of the stevedore or shipyard that employed the shore-based worker who was injured. *Alaska*

Steamship Co. v. *Petterson*, 1954, 347 U. S. 396. See *Seas Shipping Co.* v. *Sieracki*, 1946, 328 U. S. 85, 100. Moreover, while the scope of the doctrine was first extended to a longshoreman in *Seas Shipping Co.* v. *Sieracki*, *supra*, and he was engaged in the work of loading or unloading the vessel, the theory was that "he was doing a seaman's work and incurring a seaman's hazards." There is nothing talismanic about the phrase "loading and unloading"; the unseaworthiness doctrine has been applied to shore-based workers not directly engaged in loading and unloading, such as the carpenter doing some repair work in *Pope & Talbot, Inc.* v. *Hawn*, *supra*. The fact that Hawn was repairing something connected with the loading apparatus was a mere coincidence. The point was that he was a carpenter performing ship's service. *The Tungus* v. *Skovgaard*, 1959, 358 U. S. 588; *Torres* v. *The Kastor*, 2 Cir., 1955, 227 F. 2d 664; *Mesle* v. *Kea Steamship Corporation*, 3 Cir., 1958, 260 F. 2d 747.

In the cases involving many types of shore-based workers these workers were clearly entitled to benefits under the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. Section 901 *et seq.*, but it was held nevertheless that such workers might recover against the shipowner, who was not their employer, where the shipowner was negligent or there had been a breach of warranty of seaworthiness. And in the case of unseaworthiness it was quite immaterial whether or not the shipowner was at fault.

Thus the critical question in this case is whether or not the fact that the Mobilfuel was moored in navigable waters at the pier of the shipyard during her annual overhaul gives her a status such that there is no warranty of seaworthiness and no duty to Lawlor to maintain the vessel and her equipment in a seaworthy condition.

Before we attempt to ascertain the underlying principle controlling the case and discuss the pertinent authorities,

we think one or two observations will simplify the problem. Thus we cannot see that the case would differ materially as a matter of basic reasoning if the injured man had been one of the crew of the vessel instead of an employee of Bethlehem. If Lawlor was doing the work traditionally done by seamen, as we have already found to be the case, he is in the same position as a member of the crew. Moreover, we do not think resort to a mere phrase such as "out of navigation" gets us very far. Surely a vessel that has hit one of the submerged logs or other floating obstructions that plague our large harbors and has damaged her propellers so that she has to be towed to a shipyard for a day of two for repairs before continuing her voyage cannot fairly be said to have so changed her status as to eliminate any duty to the officers and crew on board to maintain the vessel and her equipment in a seaworthy condition until the repairs have been completed. Such a vessel is unable to move under her own power, she is still in navigable waters, and would seem to be no more "out of navigation" at the pier of a shipyard than she would be if moored to one of the municipal piers, awaiting tugs to move her to a place where the repairs to her propellers could be promptly made. Thus, if being "out of navigation" is a material factor, everything depends upon what we mean by "out of navigation" in the context of the doctrine of unseaworthiness. If we were pressed to decide whether the Mobilfuel was "out of navigation" in navigable waters moored at the Bethlehem pier, we would say she was not "out of navigation."

The most recent decision by the Supreme Court on this subject is *West* v. *United States*, 1959, 361 U. S. 118. There the Mary Austin was removed from the "moth ball fleet" at Norfolk, Virginia, and turned over to a contractor for "a complete overhaul," so that she could be reactivated and put in condition for sea duty. It was held that an employee of the contractor could not recover for unseaworthiness as

there was no duty on the part of the shipowner to maintain the vessel in a seaworthy condition. Six of the shipowner's men, a captain, chief mate, second mate, chief engineer, assistant engineer and steward were on board, but solely for the purpose of inspecting the progress of the work. The control of the entire vessel was at all times relevant to the issues in the case in the contractor. She was about as unseaworthy as a vessel can be and still remain afloat[1] and she was turned over to the contractor "for the sole purpose of making her seaworthy."

As said by Mr. Justice CLARK:

> "It would appear that the focus should be upon the status of the ship, the pattern of the repairs, and the extensive nature of the work contracted to be done, rather than the specific type of work that each of the numerous shore-based workmen are doing on shipboard at the moment of injury."

Thus the test formerly adopted as the rule in this Circuit by our decisions in *Halecki* v. *United New York & New Jersey S.H.P. Ass'n*, 1958, 251 F. 2d 708, reversed, 1959, 358 U. S. 613, and *Berge* v. *National Bulk Carriers Corp.*, 1958, 251 F. 2d 717, must be regarded as no longer applicable. As to a vessel in navigable waters that test was, as stated in *Berge* at page 718, "whether the work on which the plaintiff was engaged was of a kind that the crew of a vessel was accustomed to perform." And in *Halecki* we applied this test to a vessel in a shipyard for annual overhaul and repair. True it is that if the injured shore-based worker was engaged in work not traditionally or customarily performed by members of the crew of the vessel, as turned out to be the case in *Halecki*, there could be no recovery for unseaworthiness. But in *Berge* the vessel had been turned over to the shipyard to be reconstructed and re-

1. "It is not as though the 'Mary Austin' had finished a voyage and was having repair work done before resuming business again." *West* v. *United States*, 3 Cir., 1958, 256 F. 2d 671.

built. The *ratio decidendi* of the case in this Court, however, was not that there was no warranty of seaworthiness because of the status of the vessel but "that the reconstruction of a ship was not traditionally the task of the crew" (at page 718). Now the problem must be approached from a different angle, for we had held it sufficient merely to require proof that the vessel was in navigable waters and that the shore-based worker was engaged in seamen's work, and consequently the surrender or lack of surrender of control of the vessel to the shipyard had no relevancy. See 251 F. 2d at page 711.

West, however, makes it clear that, at least in some cases, control of the vessel is a decisive factor, for there it was said:

> "Petitioner overlooks that here the respondent had no control over the vessel or power either to supervise or to control the repair work on which petitioner was engaged. We believe this decisive against both aspects of plaintiff's dual theory" (negligence and unseaworthiness).

Thus we must grope for some rational basis for deciding this case, as we were required to do in the analogous situation of determining what factors brought a vessel within the intent of the general provisions of the Jones Act. Cf. *Bartholomew* v. *Universe Tanksnips, Inc.*, 2 Cir., 1959, 263 F. 2d 437.

We have concluded that the character of the work to be done by the shipyard, the presence or absence of a crew performing the customary work of seamen on shipboard, and the consequent measure of control or lack of control by the shipyard over the vessel as a whole, are the determining factors that rule the decision of this case. Doubtless cases will arise in which the question of fact relative to the degree of control exercised respectively by the shipowner and the shipyard may be difficult of resolution. But

here we have no conversion of a prisoner of war transport into a passenger carrier for the families of overseas service men (*Lyon* v. *United States*, 2 Cir., 1959, 265 F. 2d 219), nor extensive repairs amounting virtually to the reconstruction and rebuilding of the vessel (*Berge, supra*), nor a wholly deactivated vessel from the "moth ball fleet" (*West, supra*), nothing in the category of major repairs or structural and extensive changes in the vessel, but only a large number of relatively small miscellaneous items such as are generally included in an annual overhaul. While Bethlehem controlled the particular area where the scaffolds and ladders were put up and where the work of locating and repairing the leaks in the tank bulkheads was being performed, the shipowner had general control of the vessel and a full crew of officers and men were aboard. Under these circumstances we hold there was a warranty of seaworthiness by the shipowner running in favor of the crew and also in favor of shore-based workers on the vessel performing work customarily done by seamen.

It is clear that the ladder from which Lawlor fell was not properly secured to the scaffold and the instructions to the jury on the subject of unseaworthiness were perhaps more favorable to the shipowner than it was entitled to. In an event, we find no merit in the claim of error and it is even doubtful if the point now argued by appellant Socony-Mobil Oil Company, Inc. was properly raised at the trial.

Affirmed.

Appendix B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighth day of March one thousand nine hundred and sixty.

Present—Hon. J. WARREN MADDEN,
Judge, Court of Claims,
Hon. HAROLD R. MEDINA,
Hon. STERRY R. WATERMAN,
Circuit Judges.

CECIL LAWLOR,
Plaintiff-Appellee,

v.

SOCONY-VACUUM OIL COMPANY, INC., now known as SOCONY-MOBIL OIL COMPANY, INC.,
Defendant and Third-Party Plaintiff-Appellant,

—and—

BETHLEHEM STEEL COMPANY,
Third-Party Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk